(9)

No. 91-542

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., Warden, et al.,
*Petitioner,*

*vs.*

FRANK ROBERT WEST, JR.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*

## QUESTION PRESENTED

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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## INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of a claim already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented in writing to the filing of this brief.

## SUMMARY OF ARGUMENT

The use of habeas corpus to relitigate *de novo* claims of trial error already considered on appeal is not justified by the common law, the Constitution, or the Habeas Corpus Act of 1867. It is entirely a judicial creation of the twentieth century. Neither precedent nor legislative inaction justifies its retention.

*De novo* review of application of law to the facts should be reserved for truly fundamental claims, such as coerced confession, mob domination of trials, and denial of counsel. Other claims, including sufficiency of the evidence, should not be relitigated if the state courts have fairly reached a conclusion on which reasonable judges can differ.

## ARGUMENT

### I. The historical "Great Writ" was not an instrument of collateral attack on felony convictions.

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different in both purpose and function from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* *131.

#### *A. Common Law.*

Habeas corpus earned its hallowed place in history as a judicial protection against illegal detentions by the executive.



See *id.*, at *134; see also *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in the judgment). However, the principal use of habeas corpus in routine criminal cases was to review the decision to commit the accused before trial. Hale places his entire discussion of habeas corpus under the heading of bail. See 2 M. Hale, *Pleas of the Crown* 143-148 (1736). The celebrated Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 was passed for the benefit of persons "committed for criminal or supposed criminal Matters" who had been denied release on bail "in such Cases where by Law they are Bailable." *Id.*, preamble. The Act's principal reform expressly excluded from its operation "Persons Convict or in Execution by legal Process." *Id.*, § 3; *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 202 (1830).

*Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (1670) is often cited with vigor as authority for the proposition that habeas corpus could be used as a collateral attack. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 404-405 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). However, *Bushell's Case* was unusual in several respects, and it was not followed for such a broad proposition.

The first and most obvious distinction was that *Bushell's Case* was a contempt proceeding and not a trial for a crime. The *Bushell* Court itself emphatically distinguishes the two situations. Vaughan, at 142-143, 124 Eng. Rep., at 1009-1010. The essential difference between the two was that a person accused of a crime had a remedy in trial by jury, *ibid.*, and the *Bushell* Court had great confidence in the English institution of jury trial.[2]

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2. Indeed, the main point of *Bushell's Case* was preserving that institution. Bushell was a juror held in contempt for bringing in the "wrong" verdict. *Id.*, at 135-136.

The second distinction was that Bushell had been committed by the Court of Oyer and Terminer, which was an inferior court within the English judicial structure. In *Brass Crosby's Case*, 3 Wils. 189, 195, 95 Eng. Rep. 1005 (1771), counsel cited *Bushell's Case* to no avail. Crosby had been committed for contempt by the House of Commons, which the Court of Common Pleas considered a coordinate court for this purpose. "[T]heir adjudication is a conviction, and their commitment in consequence, is execution; *and no Court can discharge or bail a person that is in execution by the judgment of any other Court.*" *Id.*, at 199 (emphasis added). Justice Blackstone concurred, stating "for if they have power to decide; they ought to have the power to punish: *no other Court shall scan the judgment of a Superior Court.*" *Id.*, at 204.

*King* v. *Suddis*, 1 East 306, 102 Eng. Rep. 119 (1801) confirms that habeas was not available to collaterally attack a judgment of conviction by a competent court. Lord Chief Justice Ellenborough's comments during argument in *Burdett* v. *Abbott*, 14 East 1, 63-73, 104 Eng. Rep. 501 (1811) indicate that *Bushell's Case* was not read as broadly as its wording might imply.

*B. Early American Cases.*

In the United States, the writ of habeas corpus was a part of our heritage and was protected against suspension in the Constitution. U. S. Const. art. I, § 9. For the content of the privilege of habeas corpus, our courts looked to that common law heritage. *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 93-94 (1807). Because *Bollman* involved a pretrial writ, *id.*, at 76, the decision in that case did not involve a conflict with a judgment of another court, but only with a preliminary decision to commit. The Supreme Court's decision to go to the merits of the case *de novo*, therefore, did not conflict with the common law rule.

*Ex parte Kearney*, 7 Wheat. (20 U. S.) 38 (1822), on the other hand, did involve a judgment by the circuit court. Kearney had been held in contempt, and his attorney cited *Bollman* and *Bushell's Case* for the proposition that the Supreme Court



could review this decision on habeas corpus. *Id.*, at 40. Justice Story, writing for a unanimous Court, rejected the argument and followed *Brass Crosby's Case*, *supra*. 7 Wheat., at 43. The Supreme Court at that time had no jurisdiction to revise the judgment of the circuit court directly, and would not do so indirectly. *Id.*, at 42. Justice Story notes that if a conviction for a criminal offense had been under attack "it could hardly be maintained" that a court with no jurisdiction to hear an appeal from that conviction could revise it on habeas corpus. *Id.*, at 43.

That precise question arose in *Ex parte Watkins*, 3 Pet. (28 U. S.) 193 (1830). "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous," Chief Justice Marshall wrote for a unanimous Court. *Id.*, at 203. *Watkins* distinguished *Bollman* as not involving a judgment of a court and followed *Kearney* in refusing to reconsider the merits. *Id.*, at 208.

After serving the jail portion of his sentence, Watkins was kept in jail, purportedly under writs of *capias ad satisfaciendum* issued to collect the fines assessed against him. *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 571 (1833). He returned to the Supreme Court with two complaints: that the fine was excessive and that his continued detention was not authorized by the writs.

Justice Story, writing for the Court, dispatched the first objection in a single paragraph. Even though the habeas petition raised a specific constitutional objection going directly to the constitutionality of his sentence, the Court's lack of appellate jurisdiction over the case precluded it from revising the judgment on habeas corpus. *Id.*, at 574. Watkins was discharged, however, because his continued detention after the return date of the *capias* writ was not authorized by that writ. *Id.*, at 578-579.

There is an undercurrent in these old authorities that runs throughout the history of habeas corpus. The availability of

the writ to a person committed by a judicial officer depends on the degree of confidence which courts have in that officer and in other means of review.

Accused persons could be committed for trial by justices of the peace. 4 W. Blackstone, *Commentaries* *296. Because these officials were not necessarily learned in the law, see 1 Blackstone, at *352-353 (qualifications), it was obviously necessary to have some method of review of pretrial commitments, and such review was the usual function of habeas corpus.

*Bushell's Case*, *supra*, clearly distinguishes contempts from criminal cases on the basis of confidence in the jury system. Vaughan, at 142-143. Lord Ellenborough further distinguishes inferior from superior court contempt judgments. *Burdett* v. *Abbott*, *supra*, 14 East, at 73. Again, the difference is confidence. "It is a confidence, that may, with perfect safety and security, be reposed in the Judges [of superior courts] . . . . " *Brass Crosby's Case*, *supra*, 3 Wils., at 204 (Blackstone, J., concurring).

The early Supreme Court habeas cases reflect Congress's decision as to which determinations were subject to review. In *Bollman*, *supra*, 4 Cranch, at 99-100, the Court noted that Congress had expressly authorized the Supreme Court to make pretrial detention decisions. In *Kearney* and *Watkins*, on the other hand, the fact that Congress had decided to repose confidence in the circuit courts to render unappealable final judgments was decisive.

*C. Post-Reconstruction Cases.*

The rule of *Kearney* and *Watkins* was not limited to federal practice. It was the general rule throughout the United States in the mid-nineteenth century that a court could not revise indirectly through habeas corpus a judgment which it had no power to revise directly on appeal.

> "A superior court, in the exercise of its revisory jurisdiction, may discharge a prisoner held under criminal process, where the commitment is voidable only, or where the grounds of commitment are insufficient; but to justify this it must have, by its constitution, appellate jurisdiction in the given case, and should exert its corrective power through process designed to bring under review the errors complained of, or the grounds of commitment.
>
> "1st. The court issuing the writ in such cases must be clothed with a supervisory power in the given case.
>
> "*It is not enough that it is a court of more extensive jurisdiction or of higher dignity; it must have the power of revision in the particular case*; the power to correct or reverse the action of the inferior court." R. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 348-349 (2d ed. 1876) (emphasis added, footnote omitted).



This contemporary understanding of the law of habeas corpus must be kept in mind when considering the Habeas Corpus Act of 1867. By its terms, the Act merely extends jurisdiction to state prisoners, removing a limitation in the Judiciary Act of 1789. 14 Stat. 385, ch. 28, § 1; cf. 1 Stat. 73, 81-82, ch. 20, § 14. If Congress really intended to abrogate the rule of *Kearney* and *Watkins* and make habeas a substitute for appeal, it is exceedingly odd that it did not say so. *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in the judgment); *Fay* v. *Noia*, 372 U. S. 391, 452 (1963) (Harlan, J., dissenting).[3]

The scope of federal habeas corpus did expand in the late nineteenth century, but not in state prisoner cases under the 1867 act. The major expansion of habeas review came in cases

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3. Congress did modify the common law rule by permitting the petitioner to contest the facts stated in the return. This statutory modification follows one adopted by Parliament in 1816, 56 Geo. 3, ch. 100, § 3, and in numerous states. See Hurd, *supra*, at 273-288.

involving *federal* prisoners. The real reason for the expansion was an absence of other remedies.

The same act that gave federal courts habeas jurisdiction for state prisoners also gave the Supreme Court appellate jurisdiction over federal questions in state criminal cases. 14 Stat. 386-387, ch. 28, § 2. Yet the Supreme Court still had no general criminal appellate jurisdiction in federal cases. See *Cross* v. *United States*, 145 U. S. 571, 574 (1892).

The Supreme Court extended an effective appellate jurisdiction over the circuit courts in a limited class of cases through a strained interpretation of what was a "jurisdictional" defect. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1873) held that imposition of both a fine and imprisonment, under a statute authorizing only one or the other, was jurisdictional. *Ex parte Siebold*, 100 U. S. 371, 376-377 (1879) held that the constitutionality of the statute creating the offense was jurisdictional and subject to review on habeas. *Ex parte Wilson*, 114 U. S. 417, 429 (1885) held that trial for an "infamous" crime without an indictment was a jurisdictional defect.

At the same time the Supreme Court was expanding quasi-appellate review in cases where there was *no* direct appeal, however, the Court was shutting down habeas corpus in cases where an appeal *was* available. The mechanism for this limitation was the exhaustion doctrine. Although federal courts had the power to consider federal questions on habeas corpus, they should refrain from doing so until appellate remedies were exhausted. *Ex parte Royall*, 117 U. S. 241, 250-253 (1886). The remedies to be exhausted included the writ of error to the Supreme Court, *Tinsley* v. *Anderson*, 171 U. S. 101, 105-106 (1898), with the result that there was generally nothing left to litigate. Full exhaustion of remedies resulted in a ruling on the federal questions from the highest court.

Once again, we see confidence in the primary remedy as the driving force behind the denial of relitigation on habeas. In *In re Wood*, 140 U. S. 278 (1891), the issue was whether there had been racial discrimination in the selection of juries. That question



> "was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the Circuit Court of the United States upon a writ of *habeas corpus* without making that writ serve the purposes of a writ of error. *No such authority is given to the Circuit Courts of the United States by the statutes defining and regulating their jurisdiction.* It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a Circuit Court of the United States, upon a writ of *habeas corpus* sued out by the accused either during *or after the trial* in the state court. For 'upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.' *Robb* v. *Connolly*, 111 U. S. 624, 637." *Id.*, at 286 (emphasis added).

Contrary to popular myth, *de novo* review of convictions on habeas corpus is *not* a legacy of the common law, is *not* mandated by the Suspension Clause, and was *not* commanded by Congress in 1867. It is a judicial creation of the twentieth century, and whether it should continue depends on the continuing existence of the circumstances which brought it about. To that development we now turn.

## II. Mandatory *de novo* review is not the true holding of *Brown* v. *Allen* and has not been codified since then.

### *A. Pre-Brown Cases.*

In the early twentieth century, the availability of primary remedies was altered. The change came partly by growth of the country and partly by statutory revision. The writ of error was supposed to issue in all cases within the Supreme Court's jurisdiction, unless the decision below "was so plainly right as to not require argument. . . ." *Spies* v. *Illinois*, 123 U. S. 131, 164 (1887). Yet in later cases, the writ was denied even though clearly arguable questions were present. Compare *Ex parte Frank*, 235 U. S. 694 (1914) with *Frank* v. *Mangum*, 237 U. S. 309 (1915). In 1915, Congress made it official. It relegated federal questions other than the validity of statutes to the Court's discretionary certiorari jurisdiction. 39 Stat. 727, ch. 448, § 2.

Earlier that same year, the Supreme Court decided *Frank* v. *Mangum*, *supra*. Although *Frank* is widely regarded as having narrowed habeas corpus, the decision in fact widened it. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 486-487 (1963). The question of whether the jury was really subject to the influence of a hostile crowd was not "jurisdictional" even within the broad definition of *Lange*, *Siebold*, and *Wilson*.

The *Frank* Court implicitly accepts the proposition that if Frank's allegations were true habeas relief would be proper, a departure from the rule of *In re Wood*, 140 U. S. 278, 286 (1891). The *Frank* decision rests instead on the state court's determination of the historical facts against Frank, which "must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court . . . was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction. . . ." 237 U. S., at 336.

This is a rule of partial but not complete deference by the habeas court. *Frank* expressly left open the possibility that the determination might be reopened on a sufficient showing. *Id.*,



at 334. *Frank* deals with historical fact determinations because that is the kind of determination involved in the case. As to such determinations, the rule of partial deference has since been codified, with embellishments, by Congress. See 28 U. S. C. § 2254(d). It was also accepted by the opinion which launched the rule of *de novo* redetermination of "mixed questions." *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.). Yet nothing in the logic of *Frank* or the other cases leading up to *Brown* justifies a distinction between fact and law.

*Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) accepted *Frank* as a precedent but found that an investigation into the facts was required in that case. The reason for distinguishing *Frank* is not entirely clear from Justice Holmes' brief opinion. It may have been the magnitude of the mob domination alleged, see Brief Amicus Curiae of Criminal Justice Legal Foundation in *Keeney* v. *Tamayo-Reyes*, No. 91-1859, at 9, or it may have been the absence of any careful, reasoned state decision, see Bator, *supra*, 76 Harv. L. Rev., at 488-489.

While *Frank* and *Moore* struggled with prior adjudication in state court, a second line of cases developed dealing with prior adjudications in an earlier federal habeas petition. This other road led to the same destination: a rule of deference but not absolute preclusion.

The series begins with *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), an opinion by Justice Field as circuit justice regarding a second application for habeas corpus after denial of the first. Justice Field held that, because appeal had been made available in habeas cases, a prior, full consideration may be sufficient by itself to justify denial of the second petition. *Id.*, at 65-66.

Shortly after the Supreme Court decided *Moore*, it fully and unanimously adopted *Cuddy* in *Salinger* v. *Loisel*, 265 U. S. 224 (1924). Acknowledging that *res judicata* was not fully applicable, *Salinger* held that a prior adjudication nonetheless had weight. *Id.*, at 230. Appellate review of both habeas denials and criminal convictions reduced the need for relitigation on

habeas corpus. *Id.*, at 231.

Salinger then construed the statutory language "to dispose of the party as law and justice may require." *Ibid.*

> "A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, *and even given controlling weight*, are (a) the existence of another remedy, such as a *right in ordinary course to an appellate review in the* criminal case, and (b) a prior refusal to discharge on a like application." *Ibid.* (emphasis added).

The cases cited for this conclusion are a mixture of state-prisoner and federal-prisoner cases, *ibid.*, indicating no distinction between prior adjudications in state or federal courts. The *Salinger* Court states that a refusal to discharge based solely on a prior refusal by a court of coordinate jurisdiction would be affirmed. *Id.*, at 232.

*Wong Doo* v. *United States*, 265 U. S. 239, 241 (1924) held that under the circumstances of that case "controlling weight *must* have been given to the prior refusal." (Emphasis added). The rule of *Salinger* was therefore not always discretionary.

In *Ex parte Hawk*, 321 U. S. 114 (1944), the Court attempted to clear up the confusion surrounding habeas corpus. *Hawk* was decided on the question of exhaustion, see *id.*, at 118, but exhaustion and deference to the prior decision after exhaustion are closely related questions. *Frank* v. *Mangum*, *supra*, 237 U. S., at 336. Whether dictum or holding, the language of *Hawk* on deference to prior adjudication is enlightening.

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has



> either reviewed or declined to review the state court's decision, a federal court *will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. Salinger* v. *Loisel*, 265 U. S. 224, 230-232. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, [294 U. S.] 115, or because in the particular case the remedy afforded by state law proves *in practice unavailable or seriously inadequate*, cf. *Moore* v. *Dempsey*, 261 U. S. 86, *Ex parte Davis*, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." 321 U. S., at 118 (emphasis added).[4]

The phrase "in practice unavailable or seriously inadequate" implies something more serious than disagreement with the state court's reasonable conclusion. *Hawk* seems to reconcile *Frank* and *Moore* on their facts on the basis later suggested by Professor Bator: that the state court in *Frank* had made a careful, reasoned determination, but the state court in *Moore* had not.

*Hawk*'s citation of *Salinger* is particularly significant, because it reinforces the connection between the successive federal petition line of cases and the prior state adjudication decisions. The prior state proceeding, in other words, is entitled to the same degree of respect as a prior federal court proceeding. Federal habeas corpus review, whether on the first or second petition, should be made available when other remedies are unavailable or inadequate. It should not be used to relitigate points already fairly decided by a competent court. Reconsideration is the exception. Refusal to reconsider is the rule.

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4. *Mooney* and *Davis* are both exhaustion cases where the state court remedy had not been shown to be inadequate or unavailable at the time of application for the writ.

The question of prior state adjudication was squarely presented in *House* v. *Mayo*, 324 U. S. 42 (1945), where the district court had denied a petition on the ground that the claim had been fully and competently litigated in the state courts. *Id.*, at 47. *House* expressly acknowledges that the district court's deference would have been correct if the state court had ruled on the merits, citing *Hawk*, but reversed solely because the state court decision had been on the ground that the remedy sought was not available under state law. *Id.*, at 48.

When Henry Hawk returned to the Supreme Court, on certiorari from denial of state collateral relief, the Court explained the allocation of responsibilities between the state courts, the federal habeas courts, and the Supreme Court:

> "When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen*, 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk* v. *Olson*, 326 U. S. 271, 276 (1945).

*B. Brown v. Allen.*

With this foundation, we come to the landmark case of *Brown* v. *Allen*, 344 U. S. 443 (1953). Justice Reed's opinion is the opinion of the Court on all points except the effect of the prior denial of certiorari. *Id.*, at 451-452. Although Justice Frankfurter sought to designate part II of the first of his two opinions as a second majority opinion, *id.*, at 497, it is not designated as such by the Court. Indeed, it is not fully joined by *any* other Justice, although others express a very general agreement. See *id.*, at 488 (Burton and Clark, JJ.) ("recognize the propriety of the considerations . . . "); *id.*, at 513 (Black and Douglas, JJ.) ("agree in substance").

The opinion of the Court holds that the state court opinion should not be disregarded as to either fact or law. After dealing with independent state grounds and factual determinations, the Court states, "In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.*, at 458.



By itself, this statement is opaque. It is made clear, however, by the Court's later statement that the rule of *Salinger* applies to state prisoners. *Id.*, at 463. Nothing in *Salinger* is limited to factual determinations, and indeed the issues in that case were legal rather than factual.

Because the *Salinger* rule is one of discretion and not *res judicata*, the majority proceeds to look at the merits for the purpose of reviewing the district court's "conclusions that North Carolina accorded petitioners a *fair adjudication* of their federal questions." *Id.*, at 465 (emphasis added). The question presented, according to the majority, is "Have petitioners *received hearings* consonant with standards accepted by this Nation as adequate to justify their convictions?" *Ibid.* (emphasis added).

Where the historical facts are settled and the question is application of the law to the facts, there is more than one way to determine that the state courts have provided a "fair adjudication." One way is to look at the merits and decide that the state court's conclusion is correct. That is what the *Brown* majority proceeded to do in two of the three cases. *Id.*, at 466-482.[5]

While agreement with the result is *sufficient* for concluding that the state has provided a "fair adjudication," it does not follow that agreement is *necessary* to such a conclusion. It does not follow that a state court decision with which the federal court disagrees is necessarily unfair.

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5. The third case, *Daniels*, was decided on a procedural bar. *Id.*, at 487.

Justice Frankfurter takes the majority to task for its "[v]ague, undefined directions permitting the District Court to give 'consideration' to a prior State determination." *Id.*, at 501. The alternative he proposes, however, is an audacious revision of the law of habeas corpus, unsupported by any authority.

"State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide." *Id.*, at 506. The only authority given for this remarkable statement is part Fifth of the same opinion, at 507-508. *Id.*, n. 19. But that part does not cite *one single case* involving federal habeas for state prisoners.

Regarding the anomaly of a federal district court judge setting aside the decision of a state supreme court, Justice Frankfurter says "it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law." *Id.*, at 510.

This statement is a *non sequitur*. A state court which disagrees with a federal court is not defying the Supremacy Clause or asserting state law over federal. It is merely disagreeing on the unresolved question of what the federal law is. See *New York* v. *Eno*, 155 U. S. 89, 98 (1894). While Congress certainly does have the *power* to designate the district courts to "express the higher law" over the reasonable, contrary opinion of the state supreme courts, see 344 U. S., at 510, it is by no means a "fact" that Congress has actually done so, cf. *ibid.*

The real reason for Justice Frankfurter's position comes at the end. It is a lack of confidence in the primary remedy. "Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law." *Id.*, at 511; see also *Irvin* v. *Dowd*, 366 U. S. 717, 729-730 (1961) (Frankfurter, J., concurring).



*C. Post-Brown Developments.*

By the early 1960's, the discretionary rule of *Salinger*, *Hawk*, *House*, and the *Brown* majority was forgotten, and Justice Frankfurter's opinion was cited as if it were the holding of the Court. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 422 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Thus the rule of mandatory *de novo* review of questions of law and "mixed questions" slithered sideways into the law. No opinion of this Court has ever squarely confronted the conflict between the supposed "rule" of *Brown* v. *Allen* and the contrary interpretation of the statutes in prior cases.

In the past 16 years, some substantial exceptions to the norm of *de novo* review have been created or revived. The jurisdictional rule of procedural default was effectively abolished in *Fay* v. *Noia*, *supra*, but revived in a less severe, nonjurisdictional form in *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977). Application of new rules of law on habeas was banned, except for two extremely rare exceptions, in *Teague* v. *Lane*, 489 U. S. 288 (1989). The *Teague* principle "validates reasonable, good-faith interpretations of existing precedents made by state courts . . . ." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990).

*De novo* review has also been curtailed somewhat by a slightly expanded view of what constitutes a question of fact. After years of dubious distinctions between cases not really distinguishable,[6] *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985) acknowledged that the distinction was often driven by the result. That is, a question was classified as "factual" or "mixed" according to where the Court believed the primary responsibility for decision should be allocated "as a matter of the sound administration of justice." *Ibid.*

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6. See Brief Amicus Curiae of Criminal Justice Legal Foundation in Support of the Petition for Certiorari, at 5.

The most important existing exception to *de novo* review of law application is *Stone* v. *Powell*, 428 U. S. 465 (1976). *Powell* held that it was an open question "whether exceptions to full review might exist with respect to particular categories of constitutional claims," *id.*, at 478-479, and then proceeded to create one for Fourth Amendment claims, *id.*, at 481-482.

*Powell* is based in large part on considerations unique to the exclusionary rule. See *id.*, at 482-489. Yet the recurring theme of habeas history, confidence in the primary remedy, is also clearly present. The argument against the *Powell* rule "stem[s] from a basic mistrust of the state courts." *Id.*, at 493, n. 35. *Powell* acknowledged "the unsympathetic attitude to federal constitutional claims . . . *in years past*" but was "unwilling to assume that there *now* [in 1976] exists a general lack of appropriate sensitivity to constitutional rights" in state courts. *Ibid.* (emphasis added).

The dissent obviously does not share this confidence. See *id.*, at 525 (Brennan, J.). The dissent assumes throughout that any disagreement between state and federal courts constitutes "disrespect and disregard for the Constitution" by the state court. See *id.*, at 524. The possibility that the state court might be right and the federal court wrong does not seem to occur to the dissent.

*D. Congressional Silence.*

If exceptions to *de novo* review can be judicially created, it necessarily follows that there is no Congressional mandate for *de novo* review. If Congress had created such a rule, only Congress could create exceptions. Indeed, Justice Brennan's dissent in *Powell* is based primarily on his assumption, uncritically adopted from Justice Frankfurter, that Congress had mandated such a rule. See *Stone* v. *Powell*, 428 U. S. 465, 526-528 (1976). Yet the fact is that since 1867 Congress has never spoken a word directly on the subject of prior state determinations of law, although it has spoken on a number of related issues.



In 1891, this Court declared that procedural constitutional questions, as opposed to the constitutionality of the underlying statutes, were within the competence of the state courts to decide and could not be reexamined at all on habeas corpus. See *In re Wood*, quoted *ante*, at 9. Congress did nothing to change that rule.

In 1941, while discussing the exhaustion doctrine, this Court stated that the exhaustion of state remedies would normally settle the matter, and "a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944). Seven years later, Congress codified the exhaustion rule, with a revision note expressly citing *Hawk* as a correct statement of the law. Revision note to 28 U. S. C. § 2254, 415 (1988 ed.). In the same revision, Congress made a reference to previous federal adjudication, but nothing indicated an intent to limit the preexisting discretion to deny habeas on the basis of prior state adjudications. *Brown* v. *Allen*, 344 U. S. 443, 462 (1953).

In 1966, Congress spoke on the subject of prior state adjudications of fact, the least controversial form of deference. The *Powell* dissent claimed that this represented a ratification of the rule of *de novo* review of questions of law. 428 U. S., at 528. The *Powell* decision is necessarily a rejection of that argument.

In the same year *Powell* was decided, Congress considered whether to overrule it when it amended the habeas corpus rules. Congress decided not to decide. H.R. Rep. No. 1471, 94th Cong., 2d Sess., reprinted in 1976 U. S. Code Cong. & Admin. News 2478, 2479.

After *Teague* v. *Lane*, *supra*, carved out a second major exception to *de novo* review, Congress again considered whether to specify its own rule of retroactivity. The House and Senate could not agree, and habeas reform was stripped out of the crime bill by the conference committee. *Statement of President George Bush Upon Signing S. 3266*, 1990 U. S. Code Cong. & Admin. News, 101st Cong., 2d Sess., 6696-1.

The story was much the same in 1991. A bill supported by the President was introduced which would have abolished *de novo* review on habeas corpus. 137 Cong. Rec. S3192, S3199. The habeas provisions of this bill were incorporated into a bill which overwhelmingly passed the Senate. 137 Cong. Rec. S9982, S9999. An amendment to put those provisions into the House bill failed by a narrow margin. 137 Cong. Rec. H7996, 8005. Congress adjourned without reconciling the two bills. W. Rehnquist, *1991 Year-End Report on the Federal Judiciary* 4.

In *Helvering* v. *Hallock*, 309 U. S. 106 (1940), this Court was also faced with a situation where the same statutory language had been construed inconsistently in successive Supreme Court opinions. As in this case, Congress had never said which interpretation was correct, although it had acted in the area. *Id.*, at 120, n. 7. In such circumstances, *stare decisis* is "not a mechanical formula of adherence to the latest decision. . . ." *Id.*, at 119. Where the earlier interpretation is better reasoned, the Court should return to it. *Id.*, at 119-120.

The Framers deliberately made legislation difficult because they considered the legislature to be the most dangerous branch. See *The Federalist No. 48*, at 309 (Madison) (Rossiter ed. 1961). Legislation normally requires the agreement of three organs of government: the Senate, the House, and the President. U. S. Const. art. I, § 7, cl. 2. An erroneous interpretation of a statute by this Court should not be made permanent and unchangeable by Congressional failure to act. If such a rule is followed, then each one of these three organs has effectively acquired the power to legislate that interpretation by itself, merely by blocking the efforts of the other two to correct it. To prevent this distortion of the legislative function, this Court must retain the ability to correct its own misinterpretation of statutes, especially where Congress is deadlocked.



## III. Changes in the law and the nation since *Brown* v. *Allen* call for reconsideration.

### *A. The Scope of "Constitutional" Claims.*

At the time *Brown* v. *Allen*, 344 U. S. 443 was decided in 1953, there were few federal constitutional restrictions on state criminal procedure. The *ex post facto* and bill of attainder restrictions of the original Constitution rarely arose. The Due Process Clause of the Fourteenth Amendment incorporated only those specific guarantees which were deemed "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325(1937), overruled in *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969). Habeas petitions attacking procedural matters were thus generally limited to claims of racial discrimination, *e.g.*, *Brown*, *supra*, 344 U. S., at 465-474 (jury selection), and claims of violations so egregious as to render the entire proceeding a sham, see *Frank* v. *Mangum*, 237 U. S. 309 (1915) (mob domination); *Moore* v. *Dempsey*, 261 U. S. 86 (1923) (same); *Brown*, *supra*, 344 U. S., at 474-475 (allegedly coerced confession).

The scope of "constitutional" claims today is vastly broader. A defendant with a constitutional claim is not necessarily contending that he has been denied fundamental fairness. More often than not, he is simply contending that the trial court failed to comply with a detailed code of criminal procedure promulgated through the decisions of this Court. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155-156 (1970). Many of these rules are far from fundamental. *Id.*, at 156-157. The exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is an extreme case, serving a purely external purpose and actually detracting from the fairness and accuracy of the trial. See *Stone* v. *Powell*, 428 U. S. 465, 490 (1976).

As a result of the proliferation of prophylactic rules, the gray zones where reasonable judges differ are usually far removed from the core of the constitutional right. *Duckworth* v. *Eagan*, 492 U. S. 195 (1989) and *Butler* v. *McKellar*, 494 U. S. 407 (1990) were disputes over whether the *Miranda* rule

had been observed, not over whether the suspects had genuinely been coerced into confessing. *Francis* v. *Franklin*, 471 U. S. 307 (1985) involved a borderline transgression of the rule of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), which is extrapolated from *In re Winship*, 397 U. S. 358 (1970), which discovered that a rule of evidence previously thought to be subject to legislative control, see *Morrison* v. *California*, 291 U. S. 82, 88 (1934), was instead a part of the Due Process Clause. This is not to say that these rules are wrong or undesirable. It is only to say that "constitutional" rules today are often a long way from fundamental and far removed from the text of the Constitution. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

*B. The Availability of Counsel.*

A second and fundamental difference between state courts today and those of four decades ago is the availability of counsel. A felony defendant today has the benefit of counsel both at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and on the first appeal, *Douglas* v. *California*, 372 U. S. 353 (1963). Before a defendant ever reaches federal habeas corpus, he has had his case argued by counsel not once but at least twice. The reliability of the state courts in ruling on the federal questions is thus substantially enhanced.

*C. Acceptance of Federal Authority.*

The rule of *de novo* relitigation was part of the long struggle to establish the supremacy of federal law. From the Nullification Acts, to the Civil War, to the Little Rock school incident, to George Wallace's infamous stand in the schoolhouse door, federal authority had been bitterly resisted. Unquestionably, at the time of *Brown* v. *Allen* there were many state courts that could not be trusted. Does the same hold true today?

More progress has been made toward acceptance of federal authority in the last thirty years than in the previous hundred. Is it conceivable that in 1992 a judge of a state court of general jurisdiction would answer a federal constitutional objection by



saying "that the 'case [was] not being tried under the Federal Constitution' "? See *Estes* v. *Texas*, 381 U. S. 532, 556 (1965) (Warren, C. J., concurring). Would the governor of a state today call out the militia to block a federal desegregation order, forcing the President to call in the Army? See *Cooper* v. *Aaron*, 358 U. S. 1, 9-12 (1958). Would a governor personally stand in the way of the enforcement of a federal court order? See L. Sobel, *Civil Rights 1960-1966*, at 217-218 (1967).

These occurrences of 30 and 35 years ago are inconceivable today. The supremacy of federal law is universally acknowledged and is routinely applied in the state courts. See *Stone* v. *Powell*, *supra*, 428 U. S., at 493, n. 35; *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 210-211, 110 S. Ct. 2822, 2831 (1990). The differences today are differences of interpretation, not obstinate resistance.

The 16-year experiment of *Powell* produces some useful data on the trustworthiness of state courts in the absence of *de novo* review on federal habeas. If the dire warnings of those who insist on the necessity of *de novo* review were correct, see, *e.g.*, *Butler* v. *McKellar*, 494 U. S. 407, 430-431, n. 12, (1990) (Brennan, J., dissenting), then we could confidently expect that disaster would have occurred in the decade and a half since *Powell*. Blatant violations of the Fourth Amendment should be routinely going uncorrected in state courts, swamping this Court with clearly meritorious certiorari petitions and requiring many summary reversals.

The reality, judging from this Court's Fourth Amendment cases arising from state courts, is quite different. State courts are reversed as often for wrongly suppressing evidence as for wrongly admitting it. Looking at the October 1989 and 1990 terms, it appears that state courts were reversed for erring in the defendant's favor considerably *more* often than for erring against him. See *The U. S. Supreme Court 1989-90 Term*, 47 B.N.A. Cr.L. 3105-3117 (1990); *The U. S. Supreme Court 1990-91 Term*, 49 B.N.A. Cr.L. 3101-3104 (1991). To be sure, there are many other factors besides the correctness of the decision below in determining whether this Court takes the case. Even so, if the dismal assessment of state courts which the propo-

nents of *de novo* habeas review assert were correct, the reversal rates would surely be lopsided in the other direction.

*D. Supposed Superiority of Federal Courts.*

In the 1960's, when the specific guarantees of the Bill of Rights were being "incorporated" at a rapid clip, it was reasonable to believe that federal judges were more familiar with the Bill of Rights than state judges who had not previously needed to apply it. Not so today. Federal rights pervade state criminal procedure today, and state judges spend a somewhat larger proportion of their time on criminal cases. Compare 2 Judicial Council of California, *1988 Annual Report* 43 (47% criminal caseload in courts of appeal in 1986-87) with *1988 Annual Report of the Ninth Circuit* 56 (33% criminal and prisoner petitions in 1987). The bulk of lawyers and judges today have spent all or most of their careers in the post-incorporation environment.

As noted earlier, *ante*, at 18, the assumption that the federal habeas court is always right permeates the view of those who would preserve the *status quo*. Regrettably, this is far from true. Time and again, in recent years, this Court has been called upon to correct erroneous judgments and precedents of the federal courts on issues where the state courts were right from the beginning. See, *e.g.*, *Pulley* v. *Harris*, 465 U. S. 37 (1984); *Wainwright* v. *Goode*, 464 U. S. 78 (1983); *Kuhlmann* v. *Wilson*, 477 U. S. 436, 459-461 (1986); *Lewis* v. *Jeffers*, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990); *Estelle* v. *McGuire*, 60 U. S. L. W. 4015 (1991). Compare *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 524-525, 110 S. Ct. 3047, 3053-3054 (1991) with *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988). For the reasons stated in the Attorney General's brief, the present case is also an example. "Misapplication of this Court's opinions is not confined to the state courts. . . ." *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 519 (1955).



**IV. The rule of *Salinger/Hawk* should be restored, with additional guidance, denying reconsideration for most "mixed questions."**

"Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469 (1991). That burden must surely be borne in a case such as *Moore* v. *Dempsey*, 261 U. S. 86 (1923), in the extremely unlikely event that such a travesty could occur today and go uncorrected by the state courts. On the other hand, these scarce resources and those of the state are squandered relitigating cases such as *Blair* v. *McCarthy*, 881 F. 2d 602 (CA9 1989), dismissed as moot and remanded, 112 L. Ed. 2d 391, 111 S. Ct. 377 (1990), disapproved in *Estelle* v. *McGuire*, 60 U. S. L. W. 4015, 4017, n. 2 (1991). The essential question is how to apportion the resources according to the magnitude of the alleged error.

From the very early days of federal habeas for state prisoners, this Court has recognized that the lower federal courts have the power to interfere with state criminal proceedings, but that this power must be exercised sparingly. *Ex parte Royall*, 117 U. S. 241, 252-253 (1886). The exhaustion doctrine of *Royall* is the best example of such a limitation. Although originally a guideline for the court's discretion, it has become a set of rules developed through long experience, with only a limited area left for individual judgment. See *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982) (mandatory dismissal of mixed petition). This is a salutary development, for the outcome of a legal proceeding ought not to depend on which judge is selected at random from those on the roster of the court.

The doctrine of procedural default has similarly evolved as a nonjurisdictional limitation on the exercise of the power of habeas corpus. See *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 655-657, 111 S. Ct. 2546, 2553-2555 (1991); *Murray* v. *Carrier*, 477 U. S. 478, 497 (1986) ("sound and workable means of channeling the discretion"). The rule against consideration of successive petitions is another example. See generally *McCleskey*, *supra*.

With regard to prior adjudications on the merits in state court, questions of fact are now governed largely by statute, 28 U. S. C. § 2254(d), while questions of pure law are governed largely by the "new rule" principle and its exceptions. As to the application of the law to the specific facts of the case, however, amicus submits that the time has come to restore the basic rule as stated in *Ex parte Hawk*, 321 U. S. 114 (1944): "a federal court will not *ordinarily* re-examine upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (emphasis added). The interpretation of the words "to dispose of the party as law and justice may require" as set forth in *Salinger* v. *Loisel*, *ante*, at 12, should be restored. That interpretation has not been overruled by this Court or by Congress, and no good reason exists for not following it.

Although amicus believes the *Salinger/Hawk* rule to be basically correct, Justice Frankfurter had an undeniably valid point when he said that the *Brown* majority and *Hawk* did not provide sufficient guidance for determining whether the case was an ordinary or extraordinary one. *Brown* v. *Allen*, 344 U. S. 443, 501 (1953) (opinion of Frankfurter, J.); see *McCleskey*, *supra*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Instead of the guidelines Justice Frankfurter set down nearly four decades ago, however, amicus submits that this Court should establish new guidelines taking into account the changes in the nation and the law which have occurred in the interim.

"[C]laims of constitutional error are not fungible." *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting). Despite the protests raised against this thesis, *Stone* v. *Powell*, 428 U. S. 465, 529 (1976) (Brennan, J., dissenting), its truth is, by this time, undeniable. It is demonstrated by the differences in retroactivity, both under the old regime, *Lundy*, 455 U. S., at 543, n. 8 (Stevens, J., dissenting), and under the new one, see *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989) (exception to *Teague* for categorical exemption from punishment).

Constitutional claims are also classified for the purpose of harmless error analysis. In *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), there was no dispute that some claims are subject to harmless error analysis and



some are not. The only dispute was the classification of the claim in question. Compare *id.*, 113 L. Ed. 2d, at 331, 111 S. Ct., at 1265, (Rehnquist, C.J., for the Court on this point) with *id.*, 113 L. Ed. 2d, at 321, 111 S. Ct., at 1256, (White, J., dissenting on this point).

For the application of law to specific facts, amicus submits that the Court should accept the frank admission in *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985), that the question of whether federal habeas courts should defer to the state adjudication is a "matter of the sound administration of justice" to be established issue by issue. Useful guideposts for this determination can be found in several aspects of this Court's decisions. How early in our history was the rule recognized as constitutional as applied to the states? Was the rule fully retroactive? What kind of harmless error analysis has been applied to violations of the rule?

A few examples will help illustrate these considerations. The right to counsel was recognized in complex cases long before the incorporation doctrine. *Powell* v. *Alabama*, 287 U. S. 45 (1932). The extension of that right to all felonies was fully retroactive, see *Pickelsimer* v. *Wainwright*, 375 U. S. 2 (1963), and a violation is reversible *per se*. *Fulminante*, *supra*, 113 L. Ed. 2d, at 331, 111 S. Ct., at 1265. Thus, if a state denies counsel to a felony defendant who never, at any time in the proceedings, makes a valid waiver, or if the state appoints counsel under external conditions making effective assistance impossible, see *Powell*, *supra*, 287 U. S., at 71, the federal court should apply the law to these facts *de novo*. On the other hand, federal scrutiny of counsel's actual performance following a valid appointment is a relatively recent development, and such a claim requires an affirmative showing of prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). These determinations are appropriate for a degree of deference to the prior adjudication, discussed further below.

Coerced confessions were also recognized very early as constitutional violations. *Brown* v. *Mississippi*, 297 U. S. 278 (1936). Although they have recently been held to be subject to harmless error analysis by a narrow majority in *Fulminante*,

*supra*, the "half century of unwavering precedent" described by *Miller*, *supra*, 474 U. S., at 115, justifies *de novo* review of such claims.

Antiquity and rejection of harmless error similarly justify *de novo* review of claims of systematic exclusion of minorities from jury service. See *Vasquez* v. *Hillery*, 474 U. S. 254, 260-261 (1986). The same is not true of *Batson* claims. They involve a rule of much newer vintage, and their adjudication depends heavily on the trial judge's evaluation. See *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). Although undeniably important, the *Batson* rule was not so fundamental as to require retroactive application on habeas corpus. *Allen* v. *Hardy*, 478 U. S. 255 (1986).

Under these standards, the vast majority of law application claims will be subject to deference to the prior state adjudication. The question, then, is what degree of deference is appropriate? A couple of points need to be considered here.

First, the habeas court should consider the nature of the state proceeding, for not all proceedings are entitled to equal deference. See *Ex parte Cuddy*, 40 F. 62, 66 (C.C.S.D. Cal. 1889). The federal statute and rules contemplate that "it is the duty of the court to screen out frivolous applications" without a hearing. Advisory Committee Note to Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts. The state courts should be permitted a similar screening process in state habeas proceedings, and the outcome of that process should be respected. If the federal petition presents the same claims summarily dismissed by the state court, that dismissal is entitled to deference under the standard described below. If the federal petition presents new grounds, they should be dealt with under the doctrines of exhaustion and procedural default.



If the allegations in a state habeas petition were sufficiently substantial to warrant a hearing in state court, the federal court should consider whether counsel was available.[7] The state has no obligation to provide counsel on state habeas, *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987), but if it requires a prisoner to go into a habeas hearing unaided, it cannot expect deference to the result of a lopsided contest. A defendant who spurns the state's offer of counsel, on the other hand, should not be permitted to exploit his own folly.[8]

The second question is whether the state court actually reached the merits. See *House* v. *Mayo*, 324 U. S. 42, 47-48 (1945). If not, the case is properly considered under the rules of exhaustion and procedural bar. Considerations similar to those in *Ylst* v. *Nunnemaker*, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) and *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) may be necessary to decide this question. Significantly, the rule amicus proposes will produce an affirmative incentive for state courts to reach the merits, in contrast to the opposite incentive of the procedural default rule.

If (1) the issue is one subject to deference, (2) defendant had or waived counsel on direct appeal and on any state collateral review requiring a hearing, and (3) the state court actually reached the merits, then amicus submits that the federal court should decline to reconsider the question, unless the state decision is so clearly wrong that reasonable, competent judges cannot differ. The state courts have an equal responsibility to resolve federal questions and are equally competent to do so. The fact that one set of judges disagrees with another

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7. An argument can be made that counsel should always be provided on the first habeas petition of a capital defendant. Cf. 21 U. S. C. § 848(q)(4)(b). As this is not a capital case, this point need not be addressed.

8. The state is required to provide counsel to indigents on appeal. *Douglas* v. *California*, 372 U. S. 353 (1963). Absent an independent violation of that right, the issues presented on appeal will necessarily have been briefed by counsel unless defendant waived counsel.

on a nonfundamental question is not a good enough reason to interfere with a final judgment of a court of competent jurisdiction.

Applied to the present case, the issue is straightforward. Not only was West found in possession of a variety of unusual, recently stolen items, but, in addition, he gave an explanation which the jury must have concluded was a lie. Even though exculpatory on its face, there is certainly nothing wrong with the jury considering a false explanation as inculpatory. *Wilson* v. *United States*, 162 U. S. 613, 620-621 (1896). Reasonable judges could certainly conclude that this verdict is sustainable under *Jackson* v. *Virginia*, 443 U. S. 307 (1979). The *Jackson* rule is a nonfundamental rule, not traditionally considered constitutional. See *Sunal* v. *Large*, 332 U. S. 174, 179 (1947). The state court decision, rendered in a considered judgment after presentation of defendant's case by counsel, is entitled to deference.

## CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*